A **ELIZABETH JEEVAMALAR PONNAMPALAM & ORS**

v.

KARUPPANNAN RAMASAMY & ANOR;
SUNDRAM MARAPPA GOUNDAN
B **& ANOR (INTERVENERS);**
RAYA REALTY (THIRD PARTY)

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
C MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: W-02-728-2003]
11 APRIL 2007

D ***LAND LAW:*** *Sale of land - Contract for sale - Option to purchase - Whether terms complied with - Whether deposit paid within required time frame - Whether contract concluded*

LAND LAW: *Sale of land - Agent - Agent contracted to sell principal's land at lower price than that set by principal - Whether agent acted* E *within apparent/ostensible authority*

CONTRACT: *Sale and purchase of land - Option to purchase - Whether terms complied with - Whether deposit paid within required time frame - Whether contract concluded*

F

CONTRACT: *Agency - Sale of land - Principal and agent - Agent contracted to sell principal's land at lower price than that set by principal - Whether agent acted within apparent/ostensible authority - Contracts Act 1950, s. 190 illus. (a)*

G

The six appellants herein were the owners of about 12.5 acres of land ('the land'). The third party was an estate agent appointed by the appellants and was given an option to offer and sell the land at RM30,000 per acre. The respondents and the interveners claimed to have purchased the land at RM28,000 per acre and H sought specific performance of the sale of the land in the High Court. The appellants counter claimed and sought, amongst other things, for the removal of the caveat lodged by the respondents and issued a third party notice of indemnity against the third party in respect of the action against them. The trial judge granted I specific performance of the sale of the land to the interveners,

awarded damages to the respondents and dismissed the counter claim and third party claim by the appellants. Hence, the appellants' appeal.

Held (allowing appellants' appeal in so far as against respondents and interveners but not as against third party) Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) An option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with. The evidence showed that ten per cent of the purchase price was not paid within the required time frame and that there was no acceptance of it by the appellants. It followed that there was no binding or concluded contract between the interveners and the third party. Consequently, there was no binding or concluded contract between the interveners and the appellant vendors. (paras 9 & 10)

(2) The respondents' claim as pleaded in their statement of claim was based on an oral agreement of sale made with the third party. The trial judge erred when he failed to consider the pleaded case at all. Instead he found that there was a concluded agreement in writing, namely, the option. There was no amendment made to the respondents' statement of claim on that point. The failure to consider a pleaded case is a clear misdirection and the appellate court has a duty to intervene. Even if the trial judge was right in concluding that there was an option which constituted an agreement, the evidence showed that the deposit was not paid within the required time frame. Further, the third party returned the cheque deposit to the respondents. Since the deposit under the option was not paid, there was no binding or concluded contract between the respondents and the third party. Consequently, there was no binding or concluded contract between the respondents and the appellants. (paras 11, 12, 13, 17 & 18)

(3) The option granted to the respondents was conditional upon the lapse of the existing offer by the interveners. That was the pleaded case by the third party. The appellants, too, pleaded that in the alternative. The trial judge failed to address that aspect of the case. In fact evidence was led by the third

party on that point. Had the trial judge adequately approached that point as an issue before him, he would have found that the facts did not support a finding of a concluded contract. (para 19)

(4) The third party as estate agent acted within its apparent or ostensible authority in its dealings with the interveners and the respondents. When it set the purchase price at RM28,000 per acre, the interveners and the respondents were fully entitled to accept it as that set by the appellants as landowners and act accordingly. Even if the appellants had not given their consent, the offer was made by the third party in the ordinary and usual course of its business as estate agent representing the appellants (Contracts Act 1950 s. 190 illus. (a)). (para 20)

Bahasa Malaysia *translation of headnotes*

Enam perayu di sini adalah pemilik tanah seluas lebih kurang 12.5 ekar ('tanah'). Pihak ketiga adalah agen hartanah yang dilantik oleh perayu-perayu dan diberi opsyen untuk menawarkan dan menjual tanah pada harga RM30,000 se ekar. Responden-responden dan pencelah-pencelah mendakwa bahawa mereka telah membeli tanah dengan harga RM28,000 se ekar dan berikutnya telah memohon kepada Mahkamah Tinggi untuk perintah pelaksanaan spesifik. Perayu-perayu menuntut balas dan memohon, antara lain, untuk mengenepikan kaveat yang dimasukkan oleh responden-responden. Perayu-perayu juga mengeluarkan notis pihak ketiga bagi menuntut indemniti berkaitan tindakan guaman yang mereka hadapi. Yang arif hakim membenarkan pelaksanaan spesifik kepada pencelah-pencelah, mengawardkan gantirugi kepada responden-responden dan menolak tuntuan balas dan tuntutan pihak ketiga perayu-perayu. Perayu-perayu merayu terhadap keputusan.

Diputuskan (membenarkan rayuan perayu-perayu terhadap responden-responden dan pencelah, tetapi tidak terhadap pihak ketiga)

Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Opsyen adalah satu kontrak sebelah pihak yang tidak mengikat penjamin opsyen sehinggalah terma-termanya dipatuhi sepenuhnya. Keterangan menunjukkan bahawa sepuluh peratus dari harga jualan tidak dibayar dalam tempoh yang ditetapkan

dan tidak terdapat penerimaan bayaran oleh perayu-perayu. Ianya mengikut bahawa tidak wujud sebarang kontrak mengikat di antara pencelah-pencelah dan pihak ketiga. Oleh itu, kontrak mengikat juga tidak wujud di antara pencelah-pencelah dan perayu-perayu selaku penjual.

(2) Tuntutan responden-responden seperti yang diplidkan dalam penyata tuntutan mereka adalah berasaskan satu perjanjian jualan lisan yang dibuat dengan pihak ketiga. Hakim bicara khilaf apabila beliau langsung tidak mempertimbang kes seperti yang diplid. Beliau sebaliknya mendapati bahawa terdapat satu perjanjian bertulis, yakni opsyen yang berkenaan. Pada waktu itu tiada apa-apa pindaan dibuat kepada penyata tuntutan responden-responden. Kegagalan menimbang kes yang diplid adalah satu salah arahan yang nyata dan mahkamah rayuan bertanggungjawab untuk campurtangan. Jikapun hakim bicara betul dalam mendapati wujudnya opsyen yang merupakan satu perjanjian, keterangan menunjukkan bahawa deposit tidak dibayar dalam tempoh yang ditetapkan. Selain itu, pihak ketiga telah memulangkan cek deposit kepada responden-responden. Oleh kerana deposit di bawah opsyen tidak dibayar, tidak wujud apa-apa kontrak mengikat di antara responden-responden dan pihak ketiga. Oleh itu, tiada apa-apa kontrak mengikat wujud di antara responden-responden dan perayu-perayu.

(3) Opsyen yang diberi kepada responden-responden adalah tertakluk kepada luputnya tempoh tawaran semasa pencelah-pencelah. Itu adalah kes yang diplidkan oleh pihak ketiga. Itu juga yang diplidkan perayu-perayu secara alternatifnya. Namun aspek kes ini tidak ditangani oleh hakim bicara. Malah, keterangan mengenainya telah dikemukakan oleh pihak ketiga. Sekiranya hakim bicara melihat kepada perkara tersebut sebagi satu isu di hadapannya, beliau tentu akan mendapati bahawa fakta-fakta tidak menyokong dapatan wujudnya suatu kontrak yang mengikat.

(4) Pihak ketiga selaku agen hartanah bertindak dalam lingkungan kuasa zahirnya bilamana berurusan dengan pencelah-pencelah serta responden-responden. Apabila ia menetapkan harga belian pada kadar RM28,000 se ekar, pencelah-pencelah dan responden-responden berhak untuk menerimanya sebagai harga yang ditetapkan oleh perayu-perayu selaku pemilik tanah dan

A seterusnya bertindak dengan cara yang selaras dengannya. Jikapun perayu-perayu tidak memberikan keizinan mereka, tawaran oleh pihak ketiga masih tetap merupakan satu tawaran yang dibuat dalam perjalanan biasa urusannya sebagai agen hartanah yang mewakili perayu-perayu (Akta Kontrak 1950
B s. 190, contoh (a)).

Case(s) referred to:
Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy [1996] 3 CLJ 393 HC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
C

Legislation referred to:
Contracts Act 1950, s. 190

Other source(s) referred to:
Poh Chu Chai, *Law on Banker and Customer,* 4th edn
D

For the appellants (1st-6th defendants) - Dato' Bestion Vendargon (Dennis Appadurai with him); M/s Dennis Nik & Wong
For the respondents (1st & 2nd plaintiffs) - Mura Raju; M/s Mura Raju & Co
E *For the respondent interveners (1st & 2nd intervener plaintiffs) - Datuk N Chandran (Ranjan Chandran & Susan Joseph with him); M/s Azman Joseph & Assoc*
For the respondent 3rd party - Prasad Abraham; M/s Prasad Abraham & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S3-22-118-95]

F *Reported by Usha Thiagarajah*

JUDGMENT

G

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the first to the sixth defendants against
H the whole decision of the High Court at Kuala Lumpur dated 15 August 2003. Essentially the decision of the learned trial judge of the High Court comprises of the following orders:

(i) that the first and second intervener plaintiffs (as referred to in
I the court below) are entitled to specific performance of the sale of land held under CT 4217, lots 52 and 62, Mukim

Ringlet, District of Cameron Highlands, Pahang ("the said land") at a purchase price of RM28,000 per acre against the first to the sixth defendants with costs.

(ii) that the first and second plaintiffs be awarded damages to be assessed by the learned senior assistant registrar against the first to the sixth defendants.

(iii) that the first to the sixth defendants' counterclaim against the first and the second plaintiffs be dismissed with costs.

(iv) that the first to the sixth defendants' claim against the third party be dismissed with costs.

[2] The first and second plaintiffs have also filed a cross appeal. It is the first and second plaintiffs' contention that they are entitled to specific performance of the sale of the said land at a purchase price of RM28,000 per acre against the first to the sixth defendants.

Background Facts

[3] The relevant background facts of the case are as follows:

(1) The first to the sixth defendants were co-owners of the said land of about 12.5125 acres in size.

(2) The third party, Raya Realty (sued as a firm) was acting as an estate agent and was to arrange for the sale of the said land for the first to the sixth defendants.

(3) The third party had an option dated 15 October 1988 to offer and sell the said land at RM30,000 per acre from the first to the sixth defendants.

(4) The third party offered the said land for sale at RM35,000 per acre *vide* proforma letter dated 6 October 1988.

(5) The first and second intervener plaintiffs relied on the third party's option dated 9 October 1988 and offered RM28,000 per acre to the third party to purchase the said land and authorized the third party to negotiate the purchase. The first draft agreement for the purchase of the said land was prepared by Messrs. Skrine & Co. (solicitors).

(6) The first and second plaintiffs claimed to have also purchased the said land through the third party at the price of RM28,000 per acre. They relied on the third party's option dated 10 October 1988.

(7) The first and second plaintiffs lodged a private caveat over the said land on 15 October 1988 by serial No. 691/88.

(8) Messrs. Skrine & Co. acting for the first to sixth defendants informed the third party that the negotiations for sale of the said land with the first and second intervener plaintiffs was not to be proceeded with *vide* letter dated 19 October 1988.

(9) The first and second plaintiffs sued the first to the sixth defendants and the third party who was also cited as the seventh defendant in the High Court below for specific performance of the sale of the said land.

(10) The first to the sixth defendants counterclaimed and issued a Third Party Notice of Indemnity against the seventh defendant/third party in respect of the first and second plaintiffs' action against the first to the sixth defendants.

(11) The first and second intervener plaintiffs intervened by leave of court and pleadings thereafter were filed and settled.

(12) The first to the sixth defendants again issued Third Party Notice of Indemnity against the third party in respect of the first and second intervener plaintiffs' action against the first to the sixth defendants.

Decision Of The Court On Appeal

[4] I shall first deal with this appeal by addressing to the option document dated 9 October 1988 entered into between the intervener plaintiffs and the third party, appointed as the estate agent by the first to the sixth defendants to ascertain whether there was a concluded agreement to buy and sell in respect of the said land as found by the learned trial judge. The said option dated 9 October 1988 reads as follows:

> **Re: Option to Purchase Title No: CT. No: 4217 Lot No: 52 & 62 Seksyen: ... Mukim: Ringlet Daerah: Cameron Highlands Postal Address: Batu 33, Ringlet, Cameron Highlands, Pahang**

In consideration of the sum of RM17,500.00 cash/cheque No: UMBC 711033 paid by Sinnan a/l Kandan & Sundaram s/o Marappa Goundan to me/us (the receipt of which I/we hereby acknowledge), I/We hereby grant you an option to purchase my/our above-named property subject to the following terms and conditions:

(i) The purchase price is RM28,000.00 per acre payable by a deposit often percent (10%) of the total purchase price upon your exercising this option and the balance thereof within 4 (four) months thereafter.

(ii) The balance of purchase price will be paid to Messrs. Skrine & Co., 3rd Floor, Straits Trading Building, No. 4, Leboh Pasar Besar, Kuala Lumpur as stakeholders to be released to me/us upon presentation of the transfer for registration and after deducting real property gains tax payable by me/us.

(iii) Upon your exercising this option I/we will deposit the document of title of my/our above-named property and a duly executed transfer with the aforesaid solicitors as stakeholders.

(iv) Failure on your part to pay the balance of purchase price within the time aforesaid will result in the forfeiture of the deposit.

(v) Vacant possession will be delivered to you upon payment of the balance of purchase price. Assessment and quit rent will also be apportioned as at the date of payment of the balance of purchase price.

(vi) The consideration of RM17,500.00 paid herein will be credited to an account of the deposit payable upon your exercising this option. However in the event of your failure to exercise this option RM3,500.00 will be forfeited and the balance will be refunded to you.

(vii) This option will automatically lapse if not exercised within 18.10.1988, (9) days from this date hereof.

[5] It is noted that the option dated 9 October 1988 had the following essential terms:

A (i) the purchase price was RM28,000 per acre.

(ii) the option would be exercised if ten percent deposit was paid.

(iii) the option would lapse if not exercised on or before the date 18 October 1988.

B

[6] The burden is on the first and second intervener plaintiffs to prove that they had an agreement to purchase, and had complied with the terms of the option particularly with regard to the payment of the ten percent deposit. From the evidence adduced C at the trial the first and the second intervener plaintiffs were found to have offered the price of RM28,000 per acre to the third party for the purchase of the said land and for the third party to negotiate the purchase from the first to the sixth defendants. However there is no cogent evidence that the ten percent D payment of deposit referred to in the option had been paid.

[7] From the draft agreement in respect of the purchase of the said land prepared by Messrs. Skrine & Co., it would suggest that the terms had not been finalized and agreed to by all the E defendants. The first to the sixth defendants through Messrs. Skrine & Co. had also informed the third party that the sale of the said land should not be proceeded with *vide* their letter dated 19 October 1988 and returning the two cheques belonging to the third party. The letter dated 19 October 1988 is reproduced in full F which reads as follows:

CCL/YSM/116347.9

RR/175/88

October 19, 1988.

G

Raya Realti
No. 42-1 Lorong Vivekananda
Brickfields
50470 Kuala Lumpur REGISTERED

H Dear Sirs,

C.T. No. 4217 Lot 52 & 62 Mukim Ringlet

We refer to the above and write to inform you that we have now received instructions from our clients that they are not proceeding with the sale of the abovementioned property until and unless the I Private Caveat lodged by Mr. Amchiappan a/l Sellappan and Mr. Karuppannan a/l Ramasamy is removed.

In the circumstances, we return herewith the following cheques for your onward transmission to the prospective purchasers, Mr. Sundaram s/o Marappa Goundan and Mr. Sinnan a/l Kandan:

1. UMBC Cheque No. 711034 dated 9.10.88 for the sum of RM17,500.
2. The Oriental Bank cheque No. 522209 dated 15.10.88 for the sum of RM17,500.

Yours faithfully,
Sgd.

Enc.
c.c. clients.

Based on the size of the said land of approximately 12.5125 acres the agent's selling price would be RM28,000 per acre x 12.5125 = RM350,350. This fact is confirmed by virtue of the selling price being RM350,350 as stated in the draft sale and purchase agreement prepared by Messrs. Skrine & Co. (See p. 566 of the Appeal Record (Volume II)). The vital question to be decided here is whether that ten percent of the purchase price was fully paid within the required time frame.

[8] The evidence on record showed that the intervener plaintiffs through the evidence of their representative S13 (Mohd Azri Periasamy bin Abdullah) had issued two cheques as follows:

(i) UMBC cheque 711033 dated 9 October 1988 for the sum of RM17,500 in favour of Raya Realti, the agent.

(ii) UMBC cheque 711034 dated 9 October 1988 for the sum of RM17,500 in favour of Messrs. Skrine & Co., the vendors' solicitors. (See pp. 553-554 of the Appeal Record (Volume 11)).

Therefore on 9 October 1988 only a sum of RM35,000 was paid. This is RM35 less than ten percent of the amount of RM35,035 deposit which should be issued and paid for by the intervener plaintiffs as purchasers. I am also of the view that the returning of the two cheques, ie, UMBC cheque No. 711033 and 711034 by Messrs. Skrine & Co. to the third party *vide* their letter dated 19 October 1988 would show that there was no acceptance of the ten percent deposit.

[9] There is no documentary evidence from Messrs. Skrine & Co. showing acceptance of the UMBC cheque 711034. On the contrary Messrs. Skrine & Co. *vide* their letter dated 19 October 1988 returned the said original cheque 711034, indicating that it was never banked in. This in itself would follow that there was no acceptance of the sum of RM17,500 representing a portion of the ten percent deposit. It is also noted that there is no evidence adduced on behalf of the intervener plaintiffs through their witnesses S11, S12 and S13 that they had paid the differential sum of RM35. It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with.

[10] Based on the reasons above mentioned, it is abundantly clear that the ten percent deposit was not paid by 18 October 1988 and that there was no acceptance of the ten percent deposit by the first to the sixth defendants. Thus it follows that there is no binding or concluded contract between the intervener plaintiffs and the third party and consequently there is no binding or concluded contract between the intervener plaintiffs and the first to the sixth defendants as vendors. For these reasons alone the first to the sixth defendants' appeal against the order of the learned trial judge granting specific performance of the sale of the said land to the intervener plaintiffs, would succeed and I would allow their appeal.

[11] I shall now deal with the issue of whether there was a concluded contract when payments were made by the first and the second plaintiffs in allegedly exercising the option given by the third party acting for the first to the sixth defendants. It is noted at the outset that the first and second plaintiffs' claim as pleaded by them in the statement of claim was based on an oral agreement of sale made with the third party. In this case I find the learned trial judge had erred when he failed to consider the pleaded case at all. He had instead found that there was a concluded agreement in writing namely the option dated 10 October 1988. There was no amendment made to the first and second plaintiffs' statement of claim on this point. I take the view in this case that failure to consider the pleaded case, but deciding on an unpleaded case in a civil litigation is a clear misdirection. The appellate court in the circumstances of this case therefore has a duty to intervene

where the trial court has so fundamentally misdirected itself. (See the case of *Sivalingam a/l Periasamy v. Periasamy & Anor.* [1996] 4 CLJ 545).

[12] Even assuming the learned trial judge was right in concluding that there was an option which could have constituted an agreement, he ought to have dealt with adequately the pertinent points raised by the first to the sixth defendants as follows:

(i) that the ten percent purchase price under the option had to be paid within 14 days and the option would have lapsed if the payment of ten percent was not made by 25 October 1988.

(ii) that the option was conditional upon the lapse of the existing offer by the first and second intervener plaintiffs.

[13] Based on the evidence adduced in court and from the documents produced it has been shown by the first to the sixth defendants that ten percent of the purchase price as deposit was not paid within the required time frame. The first and second plaintiffs alleged that the ten percent deposit was paid on or before 25 October 1988. The sequence of events with regard to whether the said sum was actually paid or not can be seen as follows:

[14] On 9 October 1988 the first and second plaintiffs handed over to the third party as the agent in the third party's office in Brickfields, Kuala Lumpur one MBB (Cameron Highlands) Demand Draft No. 131725 for RM16,800 and one post-dated MBB cheque No. 667064 dated 18 October 1988 for RM18,200. Therefore on 9 October 1988, the option was not exercised because only RM16,800 which was good for payment was given.

[15] On 15 October 1988 one MBB cheque No. 131739 for RM18,200 (in replacement of the post-dated MBB cheque No. 667064) was banked into the third party's account plus two postal orders amounting to RM1,400 and also banked into the third party's account by the second plaintiff. The date 15 October 1988 was a Saturday. Therefore the said MBB cheque No. 131739 for RM18,200 could only be released for payment after three working days (of a local cheque) or about seven working days (if outstation cheque). (See *Law on Banker and Customer* (4th edn) by Poh Chu Chai). It would follow that assuming the

A RM16,800 MBB Demand Draft No. 131725 is good, together with the two (2) postal orders amounting to RM1,400 is good, the first and second plaintiffs would only have paid a sum of RM18,200 by 15 October 1988 which is still less than the ten percent required. At that juncture the said ten percent deposit B was not fully paid.

[16] On 17 October 1988 Messrs. Mura Raju & Co. acting for the first and second plaintiffs wrote to Messrs. Skrine & Co acting for the vendors stating that ten percent payment for the option C was exercised by the first and second plaintiffs paying RM36,400. However, this fact cannot be correct. On 17 October 1988 the third party's solicitors, Messrs. Fernandez, D'Silva & Partners returned the first two cheques, ie, MBB Demand Draft No. 131725 for RM16,800 and the post-dated MBB cheque No. D 667064 in its original form to the first and second plaintiffs. It is noted that the RM16,800 demand draft was not banked into the third party's account. So, the issue here is whether by the holding of a cheque and/or demand draft, this would constitute acceptance by the holder in the light of the same holder returning E the cheque/demand draft a few days later (ie, rejecting it). The answer in my view clearly is that there was no acceptance in any event by the date 25 October 1988.

[17] Further on 29 October 1988 the third party's solicitors F returned RM19,600 *vide* the third party's Oriental Bank ("TOB") cheque dated 17 October 1988 to the first and second plaintiffs. This returning of deposit is further confirmed by the plaintiff's witness, PW1 in his evidence when he stated as follows:

> Refer muka surat 32 PBD:
>
> G
>
> Ya, surat ini ialah daripada Peguam Defendan Ketujuh yang memulangkan wang tersebut kepada saya.
>
> Selepas wang itu dikembalikan kepada saya oleh Peguam Defendan Kedua, saya tidak hantar balik wang tersebut kepada Defendan H Ketujuh atau Defendan Pertama hingga Keenam pada bila-bila masa.
>
> Refer muka surat 20-21 PBD:
>
> Ini adalah bayaran kepada Defendan Ketujuh pada 15.10.1988. I Wang ini juga dikembalikan kepada saya.

Refer muka surat 49 PBD:

Ya, ini surat daripada Peguam Defendan Ketujuh yang mengembalikan wang tersebut kepada saya.

(See pp. 153 and 154 of Appeal Record (Volume I)).

[18] It is clear from the above that the ten percent deposit under the option was not paid. There was no binding or concluded contract between the first and second plaintiffs and the third party and it consequently follows that there was no binding or concluded contract between the first and second plaintiffs and the first to the sixth defendants.

[19] It is also my view that the option granted to the first and second plaintiffs was conditional upon the lapse of the existing offer by the first and second intervener plaintiffs. This was the pleaded case by the third party. (See p. 68 of Appeal Record (Volume I)). This was also pleaded in the alternative by the first to the sixth defendants in their defence. (See p. 42 of Appeal Record (Volume I)). I find the learned trial judge failed to address this aspect of the case. In fact on this point evidence was led by the third party through its witness, Rajandran a/l Kovalpichay (DW2). (See pp. 333-335 of Appeal Record (Volume II)). It is my judgment had the learned trial judge adequately approached this point as an issue before him, he would have found that the facts do not support his finding that there was a concluded contract. This is because at that point of time when the offer under the said option was said to be made by the plaintiffs, the offer by the first and second intervener plaintiffs under the same said option was still subsisting. It is my considered view when the condition in the said option is not satisfied there can be no concluded contract. (See the case of *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy* [1996] 3 CLJ 393).

[20] With regard to the position of the third party in relation to his dealings with the other parties involved in this case, I am of the considered view that we need not have to consider the actual authority vested in the third party as an estate agent for the first to the sixth defendants. We are only concerned here with his apparent and/or ostensible authority in his dealings with the intervener plaintiffs and the plaintiffs in this case. In short what the third party as estate agent contrived to do was well within that so-called apparent or ostensible authority. When he said and

A set the purchase price at RM28,000 per acre the intervener plaintiffs and the plaintiffs were fully entitled to accept that statement as that of the landowners (the first to the sixth defendants) and act thereon accordingly. Even if no consent had been given by the first to the sixth defendants to the third party
B then (which intending purchasers will not normally know about) I find such an offer was made by the third party in the ordinary and usual course of his business as estate agent and as representing the landowners. Therefore it cannot be gainsaid that he did not have the apparent and/or ostensible authority to do so
C to bind his principal to the slightly lower purchase price of RM28,000 per acre for the land. (See s. 190 Illustration (a) of Contracts Act 1950). For these reasons, it is my judgment that the first and sixth defendants have no merit in their appeal against the order of the learned trial judge in dismissing their claim for
D indemnity against the third party.

Conclusion

[21] For the reasons already given I would allow the first to the
E sixth defendants' appeal with costs here and below against the order of the High Court granting specific performance of the sale of the said land to the intervener plaintiffs and the order of the High Court in awarding damages to the first and second plaintiffs to be assessed by the senior assistant registrar. The said two
F orders made by the learned trial judge are hereby set aside. The cross appeal by the first and second plaintiffs consequently would be dismissed with costs. I would also allow with costs the appeal of the first to the sixth defendants in respect of the order of the High Court in dismissing the first to the sixth defendants'
G counterclaim against the first and second plaintiffs. In allowing the first to the sixth defendants' counterclaim against the first and second plaintiffs I hereby make the following orders:

(a) An order that the caveat to the said land C.T. 4217, Lots No. 52 and 62, Mukim Ringlet, Daerah Cameron Highlands,
H Pahang Darul Makmur lodged by the first and second plaintiffs be removed pursuant to s. 327 of the National Land Code 1965.

(b) Damages for wrongfully lodging the said caveat and consequential loss if any to be assessed before the senior
I assistant registrar of the High Court and interest thereon.

[22] The first to the sixth defendants' appeal against the order of the High Court in dismissing their claim against the third party is hereby dismissed. Since the first to the sixth defendants' claim against the third party is for indemnity by the third party in respect of the claims made by the intervener plaintiffs and the first and second plaintiffs against the first to the sixth defendants and the claim is made in the alternative, there would be no order as to costs against the first to the sixth defendants.

[23] The deposit paid by the first to the sixth defendants for this appeal is to be refunded to the first to the sixth defendants. The deposit paid by the first and the second plaintiffs for the cross appeal is to be paid to the first to the sixth defendants on account of taxed costs.

[24] My learned brothers Mokhtar bin Hj. Sidin and Mohd Ghazali bin Mohd Yusoff JJCA had seen this judgment in the draft and have expressed their agreement.